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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 207.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

TEX-PENN OIL COMPANY.

No. 208.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

M. L. BENEDUM.

No. 209.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

F. B. PARRIOTT.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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INDEX.

	Page
Opinions Below, Jurisdiction and the Statutes Involved	1
Statement	2
Argument	6
Point One	7
Point Two	12
Point Three	14
Point Four	16
Conclusion	20

Table of Authorities.

Burnet v. Houston, 283 U. S. 223	19
Burnet v. Leininger, 285 U. S. 136	11
Burnet v. Logan, 283 U. S. 404	15
Corliss v. Bowers, 281 U. S. 376	11
Helvering v. Rankin, 295 U. S. 123	10
Helvering v. Taylor, 293 U. S. 507	6, 17, 19, 20
Humes v. U. S., 276 U. S. 487	15
Jankowsky v. Commissioner, 56 Fed. (2d) 1006	19
Oscanyan v. Arms Co., 103 U. S. 261	18
Rice v. Commissioner, 47 Fed. (2d) 99	19
Rockefeller v. U. S., 257 U. S. 176	12
Southern Power & Manufacturing Co. v. Commissioner, 82 Fed. (2d) 104	10
U. S. v. Safety Car etc. Co., 297 U. S. 88	15

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BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

Opinions Below, Jurisdiction and the Statutes Involved.

The opinions below* and the jurisdiction are appropriately set forth on page 2 of the petition; the statutes and regu-

* Circuit Court opinion since reported at 83 F. (2d) 518.

lations involved appear as an Appendix to the petition and need not be repeated here.

Statement.

The petition inadequately states the facts. The record is voluminous, consisting of five large volumes of 2331 pages; the oral testimony alone covers 1200 pages; the petitioner before the Board introduced over 100 exhibits and the Commissioner over 100 exhibits, of which those printed occupy almost 250 pages of the record, while some 130 exhibits consisting of tables, maps and charts too voluminous to print were sent to the Circuit Court unprinted.

On August 1, 1919, Transcontinental Oil Company, a corporation newly organized, acquired from various sources certain partially developed and undeveloped oil leases and distributing and marketing facilities, some for cash and some for newly issued stock. These acquisitions fell into three groups, each from different grantors conveying different properties and receiving distinct and separate payments, as follows: (1) Benedum and Parriott, the respondents in Nos. 208 and 209, and three of their associates, Wrather Kirkland and Lantz, owning together a 5/8 reserved interest in a block of oil leases in Comanche County, Texas, known as the Duke-Knoles leases, sold their interest to Transcontinental for $9,000,000 in cash (the Commissioner says $8,650,000, the difference representing the controversial item of $350,000), of which the two respondents together received $3,750,000 (the Commissioner says $3,400,000), and the remaining three concededly $5,250,000 cash. (2) Contemporaneously Tex-Penn, the respondent in No. 207, owning the remaining 2/8 interest in the Duke-Knoles leases (which had been transferred to it by the five associates on its organization the preceding October) and certain other properties, including the so-called Oldham and Sutton County properties and some options on South American properties, transferred all its

assets to Transcontinental for 1,007,834 shares of Transcontinental stock (the Commissioner says for such stock and $350,000 in cash), and was dissolved. (3) At the same time, Transcontinental acquired for stock, or for stock and cash, all the properties of three other companies in which Benedum and Parriott were interested, consisting of miscellaneous undeveloped oil and gas leases, a refinery, gasoline plants and related blending and marketing facilities (R. 102, F. 77-78).* From the banking group financing the transaction, Transcontinental acquired cash or cash commitments, of which $11,500,000 was used in the acquisition of the aforesaid properties and $8,725,000 was set aside as working capital, which under the agreement with the bankers, was definitely and irrevocably committed to the enterprise and could not be withdrawn (R. 71, F. 23, 24; R. 112, F. 104).

At the time Tex-Penn acquired the 2/8 interest in the preceding October, it issued its stock to the five individuals in proportion to their original interest in the Duke-Knoles leases, namely, Benedum 6/16, Parriott 3/16 (together 9/16); Wrather 2/16, Kirkland 3/16 and Lantz 2/16 (together 7/16). Shortly before the Transcontinental transaction was accomplished, namely, on July 14, 1919, Wrather, Kirkland and Lantz sold their Tex-Penn stock to Benedum and Parriott for $30 in the aggregate, upon the understanding that the stock would be returned to them in the event the deal with Transcontinental did not materalize, as it later did (R. 76, F. 32; R. 121, 128).

As to the Tex-Penn properties, it was expressly agreed that they were to pass to Transcontinental free and clear of all liabilities (R. 78, F. 36), and in the conveyance it was covenanted that the properties were "free and clear of all liens and encumbrances" (R. 78, F. 35). Tex-Penn had on hand and available $286,891.29 (R. 94, F. 59), but this was not sufficient to meet its liabilities, and it was estimated that $350,000 in addition was required (R. 78, F. 37). The five individuals voluntarily agreed to contribute this amount out

* R. signifies record reference; F. signifies the Board's numbered Findings of Fact.

of the cash coming to them from the sale of their reserved 5/8 interest (R. 77, F. 34). This was done. Parriott directed the representative of Transcontinental to deduct $350,000 from the $9,000,000 payable to the five, and turn it over to Tex-Penn.

On July 24, 1919, after Benedum and Parriott had acquired all the Tex-Penn stock, the two transferred to Tex-Penn the so-called Oldham and Sutton County, Texas, properties and the South American options, and in exchange received 66,800 shares, constituting the balance or 83 per cent. of the Tex-Penn stock authorized but unissued (R. 79, F. 38).

Full taxes were promptly paid by the five individuals on the gain from the cash received for the 5/8 interest in the Duke-Knoles leases. Benedum and Parriott paid an aggregate in excess of $1,130,000 (R. 2125, 2270) and the tax on the three associates was in excess of $1,500,000 (Ex. 90, 90A).

But the Commissioner is now claiming additional income taxes in excess of $9,100,000 arising wholly from the "paper" part of the transaction, namely, the receipt of Transcontinental stock in exchange for Tex-Penn's 2/8 interest in the Duke-Knoles leases and other miscellaneous assets. The Transcontinental stock was never actually received by Tex-Penn, having been issued at its direction to Benedum and Parriott, its sole stockholders (R. 89, F. 48). The Commissioner concedes, and the Court and the Board held that the receipt of stock alone would not subject any of the respondents to tax thereon under the 1918 Revenue Act. Claiming, however, that the $350,000 was not contributed by the five individuals to pay Tex-Penn's debts but was a *consideration paid by Transcontinental* for the Tex-Penn assets in addition to the stock constructively received, the Commissioner now asserts taxes, first, against Tex-Penn upon the receipt of such stock and cash and next against Benedum and Parriott separately upon the receipt of the same stock in the dissolution of Tex-Penn. Thus the enormous deficiencies here involved are bottomed solely upon the hypothesis that a relatively small item was paid over to one of the respondents—Tex-Penn—in addition to the shares of Transcontinental stock.

Despite the Commissioner's admission, first in his computations (R. 2122, 2269) and now again in his petition (p. 11), that Benedum and Parriott received no cash—only Transcontinental stock—in exchange for their Tex-Penn stock, he continues to assert a direct tax against Benedum and Parriott upon the receipt of the stock. The Circuit Court held that no taxes should be imposed upon Benedum and Parriott in any event (R. 2341) since the statute exempts an exchange where a person receives stock "in place of" other stock in a merger or reorganization.

The Commissioner apparently attempts to divert attention from his inconsistent position in the individual cases by the statement in the petition (p. 7) that

> "The tax liabilities of Benedum and Parriott are largely the transferee liabilities of Tex-Penn (R. 2124, 2270) and, so far as now material, may be disregarded."

Under the Board's judgment, deficiencies of $1,925,466.95 and $908,470.13, both exclusive of ten years' interest, were found against Benedum and Parriott respectively as their *direct* tax liabilities—wholly aside from any potential *transferee* liability as the sole stockholders of the dissolved Tex-Penn company. The statement that these judgments "may be disregarded" is startling unless the petitioner intends thereby to indicate that he does not seek a review in the Benedum and Parriott cases.

It adds a touch of bitter irony to learn that the taxes the Commissioner is now seeking to collect are predicated not upon real profits but upon a commercial failure. Extended drilling which exhausted its working capital failed to develop the supplies of oil which Transcontinental had anticipated. This the evidence establishes without dispute. In point of fact no profits were ever realized for the Transcontinental venture almost immediately blew up. Within two months after its organization and long before the tax year had closed it became evident that the enterprise would prove unprofit-

able. In a vain effort to stem the tide Transcontinental borrowed large sums from Benedum and Parriott and others to continue operations; eventually the venture was a complete loss (R. 110-112, F. 99-107).

Argument.

The court below in reversing the Board directed an order of no deficiency on four separate and distinct grounds any one of which required the entry of such an order. The petitioner herein, as he must, asserts grounds for certiorari on each of the four points, and unless sufficient grounds exist on all four points, the application should be denied.

In respect of the first three points, the basis put forth for a review is an alleged conflict of decisions among Circuit Courts, and in respect of the fourth "a misapplication" of a decision by this Court, namely, *Helvering* v. *Taylor*, 293 U. S. 507. Under the first three questions presented (Pet., p. 2) the Commissioner in reality is seeking nothing more than a review of the legal sufficiency or insufficiency of the evidence in this particular record. We submit that there is not and can not be any real or substantial conflict in this respect between the decision below and the decisions of other circuits in different cases involving different facts. Furthermore, a reading of the cases cited by petitioner discloses no real conflict in principle.

With respect to the fourth point, the petition does not assert that the decision below is "in conflict with the applicable decisions of this Court", but alleges a "misapplication" or an extension of a decision of this Court. This is not a sufficient ground for certiorari. Petitioner in his "Conclusion" (p. 17) suggests that the fourth point raises "a question of considerable importance". This falls far short of the rule that the decision must be on "an important question of general law in a way probably untenable or in conflict with the weight of authority". We submit that the decision in *Helvering* v. *Taylor, supra,* has definitely settled the law as to the petitioner's fourth question.

The foregoing considerations are, we believe, sufficient to warrant denial of the application for certiorari. But it may not be inappropriate to consider the four points in greater detail.

In the first place, the petition does not accurately state the four points. We beg leave to restate them as we conceive accurately and as the Court below conceived them, following, however, the order adopted by the petitioner.

POINT ONE.

Was there substantial evidence to support the Board's conclusion that Tex-Penn in exchange for its assets received *from Transcontinental* $350,000 as a cash consideration, in addition to the shares of Transcontinental stock?

"When all the facts are considered", said the Court below (R. 2341), "there is no substantial evidence upon which the Board could base its conclusion" that the $350,000 was "consideration moving from it to Tex-Penn so as to make the transaction taxable."

The Court below accepted the Board's primary findings of fact. In respect of the $350,000 item, the record shows:

1. From the Board's own findings it was mathematically impossible for the $350,000 to be part of the consideration passing from Transcontinental for the Tex-Penn assets. Transcontinental paid $11,500,000 for properties, of which $2,500,000 went to the Riverside companies, leaving $9,000,000 (R. 9, F. 49). If the $9,000,000 was paid for the individual interests in the leases, no part of that sum could have been paid to Tex-Penn as consideration for its assets. There was only one $350,000 item. The Board specifically found that Wrather, Lantz and Kirkland received $5,250,000 (R. 76, F. 34), which was their appropriate share of the $9,000,000 total—not of $8,650,000, as the Commissioner contends.

2. The inconsistency of the Board's conclusion that the $350,000 was "consideration" for Tex-Penn assets and not for the assets of the individuals, is clearly shown by the Board's finding (R. 78, F. 36) that the five individuals "in order to supply the necessary funds" to Tex-Penn "to meet its outstanding liabilities" entered into the agreement directing Parriott, acting for the five individuals, to "apply and deduct" from the $5,250,000 payable to Kirkland, Lantz and Wrather their share of the amount sufficient to pay the Tex-Penn debts, provided Benedum and Parriott, as they did, stood their share of the liabilities (R. 77, F. 34).

3. The Board's findings show that Parriott accounted to the five individuals for a total purchase price of $9,000,000 (R. 92, F. 55). The Parriott books of account describe the $350,000 as an amount "apportioned against" the $9,000,000 sales price "reducing such sales price" to $8,650,000 (R. 92, F. 56). Parriott's accounting stated (R. 1855, 1856) that the $350,000 was paid by Transcontinental to Tex-Penn "out of the sale price" due the individuals. Unrestrained by simple arithmetic, the petitioner urged the Court below to accept the impossible result that the $350,000 was consideration for the individual interests, (being "taken out" and "apportioned" against such sale price) and was also consideration paid to Tex-Penn by Transcontinental.

4. Finally, Tex-Penn, after paying off its liabilities out of a fund on hand, amounting to $286,891.29 and the $350,000 contributed by the five individuals, distributed an unneeded residue of $55,255.24 among the five individuals, although at the time of such distribution Benedum and Parriott, according to the Board's findings, were the only stockholders of Tex-Penn (R. 94, F. 59). This indicates clearly the source of the fund—it came from the five individuals—not Transcontinental.

In this respect the petition makes the definite misstatement (p. 10) that the Court below "misread the record and

failed to understand that this refund (i. e. the $55,255.24) was from the wholly separate fund of $286,891.29." The Court, we submit did not "misread the record" for the Board's own findings support this conclusion. The Board's findings are silent as to whether Tex-Penn first used the $350,000 or the $286,891.29, but it found that Parriott was directed to use the $350,000 to pay Tex-Penn debts only "after applying" all available accounts receivable of Tex-Penn (R. 77, F. 34); that only $286,891.29 was so available and, finally, that "both were used for that purpose up to an unneeded residue of $55,255.24, which residue was distributed to the five individuals" (R. 94, F. 58, 59).

5. In addition to the well-nigh conclusive state of the Board's findings as to the books of account and other documents referred to above, every living person connected with the transaction testified, without contradiction, that the $350,000 was paid by the five individuals and not by Transcontinental (R. 658, 610, 611, 614, 629, 634-5, 705, 709, 678, 715, 725). These witnesses included not only the interested parties but representatives acting for the bankers, the new company, Tex-Penn, and the five individuals, and, finally, Chrisman, the lawyer who drew the corporate documents carrying out the consolidation.

In spite of this array of uncontradicted documentary evidence and oral testimony, the Board, ignoring some of its own findings of fact, based its conclusion upon brief recitals in certain of the documents reciting that the agreed consideration paid to Tex-Penn was in part $350,000. These recitals, patently in conflict on their very face, destroyed themselves and can carry no persuasion. They are not only obviously erroneous, but were declared to be erroneous by every living person who took part in the transaction. Drawing upon the Board's own findings of fact, the Court summarized the situation as follows:

> "But notwithstanding these recitations in the papers, all of the parties to these negotiations and agreements

perfectly well understood that the lessees were individually supplying the $350,000 for the purpose of paying the debts of Tex-Penn so that its properties might be transferred free and clear of debt."

The petition (pp. 9-10) confuses the Board's ultimate conclusions—all of which involved questions of law—with its primary findings, stating that the "finding" of the Circuit Court that the $350,000 was not consideration for Tex-Penn assets was contrary to the "finding" of the Board and the Circuit Court of Appeals had no authority to make it, citing *Helvering* v. *Rankin,* 295 U. S. 123. The Circuit Court made no findings of fact whatsoever; every fact it relied upon appears in the Board's primary findings. Unlike the Board, it did not ignore certain vital findings, but upon a consideration of all the Board's findings, reached a different conclusion. We submit that the Circuit Court was well within the rule stated in the *Rankin* case that the function of the Circuit Court is to decide whether the correct rule of law has been applied to the facts found and whether there was substantial evidence before the Board to support the Board's conclusions.

The petitioner cites *Southern Power & Manufacturing Company* v. *Commissioner,* 82 Fed. (2d) 104, as in conflict with the decision below. There the issue was the ownership of property transferred to a corporation, one party claiming he alone had owned it although he and two others had executed agreements for the sole purpose of showing common ownership among the three, and it further appeared that the sales price had been divided among them in accordance with the agreement. The Court pointed out that the written document was "exclusive evidence" of the transaction.

Here the situation differs wholly. The Board rested its conclusion in the instant case entirely upon recitals and descriptive expressions contained in the "consideration" clauses of assignments and directors' resolutions. Obviously

such recitals are not conclusive and may be enquired into in order to ascertain the true nature of a transaction. Thus in *Corliss* v. *Bowers*, 281 U. S. 376, this Court held that payments characterized as income to the beneficiary were nevertheless income to the grantor; in *Burnet* v. *Leininger*, 285 U. S. 136, it was held that an agreement characterizing earnings as partnership property should be ignored and tax liability determined by the actual facts. The Court here surveyed the whole of the Board's findings of fact to ascertain the true nature of the transaction, saying (R. 2341):

> "* * * in determining tax liability, taxing authorities must look through form to fact and substance."

With some confusion of thought the petitioner apparently argues (pp. 11-12) that the non-recognition provisions do not apply to Benedum, Parriott and Tex-Penn because Kirkland, Lantz and Wrather—whose taxes are not here involved—allegedly received cash from Transcontinental for their Tex-Penn stock.

As the Circuit Court said (R. 2341): "The Board in a long unsatisfactory argument infers" that Tex-Penn stockholders received cash for their stock "but there is no evidence as distinguished from supposition to support such a theory". Furthermore, the Board's findings are inconsistent with such a theory, for it found that Benedum and Parriott "were the sole stockholders of Tex-Penn" at the time of the transaction (R. 128; R. 94, F. 59; R. 76, F. 32) and that Kirkland, Lantz and Wrather had "ceased to be stockholders". It is difficult to see how the three could receive any cash for stock they did not own.

In any event, both the Commissioner and the Board must be taken to have long since abandoned this theory. If Kirkland, Lantz and Wrather received any cash for their Tex-Penn stock, such cash in law must have passed through Tex-Penn. In the Commissioner's computation of the Tex-Penn tax approved by the Board in entering its final order, the only cash claimed to have passed to Tex-Penn was the $350,000 item (R. 286). Tested in the light of the Board's own

judgment, none of the cash passed through Tex-Penn to Kirkland, Lantz and Wrather for their Tex-Penn stock.

Next, the petition urges that the transfer of the Tex-Penn assets and individual interests in the leases constituted a single, indivisible transaction and, as such was not within the non-recognition provisions,

> "* * * since the acquisition of the privately owned leasehold interests by Transcontinental made the transaction more than the mere reorganization of Tex-Penn" (p. 12).

While this argument is not clear, apparently it proceeds on the assumption that Tex-Penn and its stockholders are subject to tax, although they received stock alone, because third parties also transferred property to Transcontinental but received cash. This is directly contrary to the rule established in *Rockefeller* v. *U. S.*, 257 U. S. 176, that income tax liability in reorganizations "must be tested by the effect of the transaction upon the individual". No case has ever questioned this rule. The Board applied it to another portion of the merger in these proceedings and the Commissioner did not appeal.* In any event, the decisions cited by the petitioner (p. 12) are not in conflict for none arose under the 1918 Act and they all involve cases where cash formed part of the consideration. Here the sole consideration received by Tex-Penn for its assets and by its stockholders for their stock was Transcontinental stock alone.

POINT TWO.

Properly stated, the second question is:

Upon conflicting evidence, is it reversible error for the Board to ignore all the evidence and, upon the basis of its

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* Parriott was a stockholder of Pittsburgh-Texas, one of the companies in the consolidation. Pittsburgh-Texas admittedly received only Transcontinental stock, which on distribution went to Parriott. The Board held that the receipt of such stock by Parriott was within the non-recognition provisions and so did not give rise to any taxable gain, even though he had received cash on the sale of his share of the 5/8 interest in the Duke-Knoles leases (R. 152).

alleged "experience" in other cases, to find a value by an unexplained method which has no rational relation to any figure in the testimony where the record does not show that the Board possessed any independent knowledge of the particular properties?

The figure of $7 a share fixed by the Board was wholly conjectural and arbitrary; it does not correspond with the testimony of any witness, either for the Commissioner or the respondents nor with any inference to be drawn from the evidence. It was made without relation to any of the testimony and was based (we quote from the Board) "on experience in many cases involving similar questions". What these cases were and what facts and circumstances the Board took into consideration, the Board did not say. They may or may not have differed from the case here. The Board, perhaps realizing it could not justify its figure, did not indicate in any way how it reached the figure, but was content with vague references to "our reasoned judgment of the fair market value of the stock after studied consideration of all pertinent facts and applicable factors". But the facts and factors are not mentioned. Nor is there the slightest evidence in the record to indicate that the Board or any of its members had any independent knowledge of the properties of Transcontinental, or the value of such properties, or the value of the stock. The Circuit Court concluded that:

> "* * * The Board may not ignore and reject all the evidence as to value and reach a conclusion based upon other facts and factors without disclosing them. * * * What these other cases were and what facts and questions the Board took into consideration; the parties were entitled to know, for they doubtless were different from those in the case at bar."

and further stated that the Board

> "* * * ignored all the evidence without showing that it possessed independent knowledge itself of the value of the properties or stock involved."

The Circuit Court recognized that

> "* * * the Board may reject expert testimony and reach a conclusion in accordance with its own knowledge and judgment, but the record must show that it has such knowledge and this it did not do."

Finally, the Court concluded that

> "* * * The Board may not fix an arbitrary and excessive value."

The cases cited by the petitioner in support of the alleged conflict in Circuit Court decisions all involved the valuation of property at March 1, 1913, for the purpose of computing the allowance for exhaustion, wear and tear, as required by the statutes. None involved the valuation of property to be treated as the equivalent of cash for the purpose of computing income; nor a finding of "arbitrary" or conjectural values based solely upon an assertion by the Board of its experience in other cases; nor the rejection by the Board of evidence without assigning clear and cogent reasons therefor. In none did the Board make a finding of value without either a reasoned explanation of its finding or a comprehensive discussion of the evidence upon which it based its finding. They are not in conflict with the decision below.

POINT THREE.

Did the 1,007,834 shares of the stock received by Tex-Penn on the transfer of its assets have any "fair market value" ascertainable with fair certainty for income tax purposes in the year 1919?

The petitioner frames the question (p. 3) unfairly and inaccurately:

> "Is stock deprived of a fair market value by an agreement of the parties restricting the sale of the stock for a limited purpose?"

This variance distorts the real issue, and having thus distorted the issue petitioner assigns conflict among circuits (p. 14).

The court below did not hold, nor was it called upon to consider, that the bare existence of a restriction on the sale of the stock deprived the stock of "a fair market value". The Court determined the issue upon vastly broader grounds saying (R. 2341):

> "Transcontinental was a new company organized for the express purpose of developing new oil properties on a large scale. This was a very hazardous, speculative and uncertain undertaking. The twelve wells which had been drilled were falling off and becoming definitely dry and profitless. The entire field which it was to develop was known to be 'spotty'. This development proved to be an absolute failure, a great financial loss and entirely worthless."

Had the court stopped here, it would have been fully justified in reversing the Board. See *Burnet* v. *Logan*, 283 U. S. 404, a case directly in point, in which this Court stated that income tax liability "can be fairly determined without resort to mere estimates, assumptions and speculation" and held that an ore mining royalty agreement "had no ascertainable fair market value" since the value was dependent "upon facts and circumstances not possible to foretell with anything like fair certainty". Similarly, in *Humes* v. *U. S.*, 276 U. S. 487, this Court refused to sanction a valuation based upon a "gamble on future events" or "mere speculation bearing the delusive appearance of accuracy". Again, In *U. S.* v. *Safety Car etc. Co.*, 297 U. S. 88, it was held that the value of property may be "too contingent and uncertain to have a determinable market value" for income tax purposes, for, as this Court stated, "unpredictable vicissitudes might reduce it to a nullity".

Wholly aside from the existence of the restrictive agreement, the uncertainties and hazards incident to the situation

were sufficient to require the conclusion that the stock in 1919 had no then presently ascertainable fair market value for income tax purposes. But, said the Court below, "Another thing increasing the hazards in this case and rendering more uncertain any guess as to the value of the stock on August 1, 1919, was the existence of a restrictive agreement". The determination of the value of the stock, said the Court, was a mere speculative guess, and when the restriction on its sale is considered, it "makes the guess wilder and more speculative" (R. 2342). The restrictive agreement was not voluntarily entered into, for the Board specifically found that it was "exacted from Benedum and Parriott" by the Bankers (R. 98, F. 68) as a condition to the financing. Taking all the circumstances together and treating the existence of the restrictive agreement not as the sole factor but one "increasing the hazards", the Court below reversed on the broad ground that it was impossible to fix with any certainty the fair market value of the stock on August 1, 1919.

The decisions cited by the petitioner (p. 14) as in conflict deal wholly with the effect of a bare restriction, unaccompanied by any other uncertainties and hazards incident to the stock. Furthermore, the restrictions there considered were found to be voluntary arrangements and not, as here, exacted by parties adverse in interest.

POINT FOUR.

Here again the petitioner does not accurately state the question. We may rephrase it as follows:

In the case of a capital gain, where the Commissioner expressly has repudiated and abandoned the deficiency figures appearing in the formal notices of deficiency and the method of reaching such figures, does the taxpayer nevertheless still carry the burden of showing he owes nothing, or, if liable at all, of proving the correct amount, or does the Commissioner thereafter carry the burden of proof?

The petitioner charges that the court below "has misapplied and extended the decision of this court in *Helvering* v. *Taylor*, 293 U. S. 507", and adds that the Court below erroneously decided "a question of considerable importance in the administration of the revenue laws." Neither of these are ground for writ of certiorari, unless the error is obvious. We submit that the case here not only does not misapply the *Taylor* decision, but is strictly within the scope of that decision.

These cases arise from the alleged realization of income in the form of a capital gain. The ascertainment of such a gain requires the determination of two underlying factors, the "receipts" and the "cost". In the Tex-Penn case, the Commissioner's notice asserted a deficiency * of $22,067,960, receipts of $48,272,506, and a cost or basis of $337,502. In a computation filed with the Board following the trial, the Commissioner varied these figures to $5,189,103, $12,444,008 and $1,188,364, respectively. In the Benedum case, the formal notice carried a deficiency of $12,007,315; in the answer to the amended petition the Commissioner raised the figure to $24,160,673; while in the computation filed with his brief at the conclusion of the trial he reduced it to $2,870,337. Corresponding variances occurred in the Parriott case. In all three formal notices of deficiency, the value of the Tex-Penn stock was taken at $47.55 a share. At the trial the Commissioner contended for a value of $12 a share (plus the $350,000 in cash), the Board itself commenting that the Commissioner "has now abandoned" the figure of $47.55 (R. 140).

The position of the Commissioner at the trial and in each of his formal computations filed after the trial amounted to a solemn declaration that in framing his original deficiency

* The "original deficiency" figures are found in the three 60-day letters, Tex-Penn at R. 41-3, Benedum at R. 2072-5, and Parriott at R. 2220-4. The "increased deficiency" of Benedum is at R. 2080 and that of Pariott at R. 2230. The three computations filed with the Commissioner's brief in the Board are at R. 57 (Tex-Penn), R. 2105 (Benedum) and R. 2253 (Parriott).

notices he had (1) overstated the receipts as to Tex-Penn by some $36,000,000, as to Benedum by some $25,600,000, and as to Parriott by some $10,200,000; (2) understated the cost or basis as to Tex-Penn by some $850,000, as to Parriott by $252,000, and overstated the cost as to Benedum by the amazing amount of $16,000,000; and (3) overstated the deficiencies in taxes as to Tex-Penn by $16,878,856, as to Benedum by $9,136,077, and to Parriott by $7,778,103.

Moreover, during the course of the trial the Commissioner *expressly* repudiated the formal notices of deficiency. Counsel for the Commissioner admitted (R. 1129) that there was "an error" made in computing the deficiency in the deficiency notices, and in response to a question from the Board whether the Commissioner "now accepts the basis that was fixed in the sixty-day letter", counsel replied: "No; the Commissioner in so far as Benedum and Parriott is concerned admits the basis of the sixty-day letter as concerns Benedum and Parriott was in error" (R. 1130-1).

The complete shift of position by the Commissioner in his computations and the statement of his counsel constituted a clear and unequivocal abandonment of the presumption in view of which the Circuit Court had power finally to dispose of the causes. *Oscanyan* v. *Arms Co.*, 103 U. S. 261.

Following this express repudiation of all the factors necessary to a computation of the taxes, namely, receipts, cost and gain, counsel for the taxpayers made it clear to the Board that in his view, in consequence of such repudiation, the burden thenceforth rested upon the Commissioner to prove the amount of the gain alleged (R. 1135).

The record in these cases is wholly devoid of any proof of cost or basis in respect of certain of the properties transferred to Transcontinental. In 1918 Tex-Penn acquired a 2/8 interest in the Duke-Knoles leases in exchange for 4,000 shares of its stock. In addition, one week preceding the Transcontinental transaction, Tex-Penn acquired the Oldham-Sutton County properties and the South American options by issuing in exchange therefor 66,880 shares of its

stock (R. 79, F. 38), which stock represented 83% of its assets. The cost or basis of such properties was the value of the stock issued therefor.* There was no evidence in the record as to the value of the Tex-Penn stock on the dates of issuance. There was a stipulation as to the *value* of the properties transferred by Tex-Penn (exclusive of the 2/8 interest in the Duke-Knoles leases), but this value figure included other properties in addition to the Oldham-Sutton and South American properties acquired for this block of stock (R. 765-7). Of course cost and value are by no means the same thing, *Burnet* v. *Houston*, 283 U. S. 223.

The Commissioner had ample opportunity to correct this fatal omission in his proof before the case was closed, but he failed to do so. At the hearing on the computations and before the entry of the final orders, the state of the record was called to the attention of the Board (R. 1746, 1761). Realizing his failure to prove this essential factor, the Commissioner presented motions after the filing of the Board's opinion asking the Board to find, without any proof on the subject, that the Tex-Penn stock issued for its properties had no fair market value at the time of issuance (R. 294, 2133, 2227). The Board failed to require further proof from the Commissioner, made no findings as to such cost or basis and denied the Commissioner's motions (R. 229, 2138, 2282). In view of this the Circuit Court held (R. 2344) that: "until the cost was determined, the gain could not be fixed and the tax determined".

As the court below held, this issue is squarely within the *Taylor* case. There, as here, there was involved a capital gain. There the taxpayer introduced evidence before the Board which showed that the deficiency notice was arbitrary and excessive in that the allocated cost used was definitely erroneous. Here not only do the facts in evidence destroy the presumption of the sixty-day notices, but the Commis-

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* *Rice* v. *Commissioner*, 47 Fed. (2d) 99, *Jankowsky* v. *Commissioner*, 56 Fed. (2d) 1006.

sioner, by admission of his counsel and by his own computations at the close of the trial expressly repudiated his sixty-day notices as erroneous, and the Circuit Court specifically held they were "arbitrary and excessive" (R. 2343). As this court said in the *Taylor* case,—

> "We find nothing in the statutes, the rules of the Board or our decisions that gives any support to the idea that the commissioner's determination, shown to be without rational foundation and excessive, will be enforced unless the taxpayer proves he owes nothing or, if liable at all, shows the correct amount."

The petitioner suggests (p. 15) that in this case, unlike the *Taylor* case, the Board did not accept the Commissioner's figure, and "the taxpayers here are not called upon to pay a tax which confessedly they do not owe". Quite the contrary. Despite the taxpayers' challenge, the Board did accept for the purpose of computing the judgments an erroneous "cost" figure which the Commissioner advanced without proof. Thus under the Board's decision the taxpayers were definitely called upon to pay a tax which they did not owe, for in the absence of proven cost figures no taxes could be determined.

The *Taylor* decision is clear and unmistakable, both in scope and application. The court below neither misapplied it nor extended it. There is no occasion for rearguing the *Taylor* case in the form of a review here.

CONCLUSION.

Petitioner in his conclusion seems to intimate that the court below was improperly influenced by the large sum involved and the harshness of imposing upon two individuals a crushing tax, for after quoting from the concluding paragraph of the opinion below—"A tax with deficiencies and interest of over $9,100,000 seems indefensible on any theory"—he adds (p. 17): "It is submitted that there has been a

departure from the accepted and usual course of judicial proceedings".

This, we submit, is an unfair and unwarranted implication drawn from a detached sentence of a lengthy opinion. The Court below overruled the Board on each of the four issues, and concluded, as stated in the next sentence following that quoted by the petition—"The transaction was not taxable". It is true that a tax of this magnitude falling upon two individual citizens would amount to complete financial destruction. It is true also, fantastic as it may seem, that the tax is sought to be imposed years after the event upon a purely hypothetical profit and the Court may well have been shocked by taxes of these proportions on a transaction that yielded not one dollar of profit to the taxpayers.

We submit that the Court acted within the limits of the accepted and usual course of appellate procedure and applied legitimately and properly the established rules governing the review of decisions by the Board of Tax Appeals.

WHEREFORE, it is respectfully submitted that the petitions for writs of certiorari should be denied.

Respectfully submitted,

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